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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 782

NATIONAL AIRLINES INCORPORATED,
Petitioner

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 145, IAM, P. L. SIEMILLER, IAM President; GEORGE M. BROWN, Representative IAM; WARREN WATTS, President and General Chairman, District Lodge 145, IAM; GUS BALLAS, Member of the Negotiating Committee for District 145, IAM; STANLEY OBER, Member of the Negotiating Committee for District 145, IAM; CHARLES STRAKE, Member of the Negotiating Committee for District 145, IAM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 8

Conclusion 15

Appendix 1—Opinion, United States Court of Appeals, Fifth Circuit, July 15, 1970 ..... A1

Appendix 2—Order Denying Petition for Rehearing and Petition for Rehearing En Banc A9

Appendix 3—Opinion, United States Court of Appeals, Fifth Circuit, September 23, 1969 ..... A10

Appendix 4—Judgment, United States Court of Appeals, Fifth Circuit, October 15, 1969 ..... A25

Appendix 5—Order on Mandate, United States District Court, Southern District of Florida A26

Appendix 6—Pertinent Sections of Railway Labor Act A34

Authorities

Cases

American Construction Co. v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1892) 6

Boys Markets, Inc. v. *Retail Clerk's Union*, ... U.S. ....., 26 L.Ed.2d 199 (1970) 12

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 6

Carroll v. *Princess Anne*, 393 U.S. 175 (1968) 14

Confectionary & Tobacco Drivers v. *National Labor Relations Board*, 312 F.2d 108 (2nd Cir. 1963) 10

Detroit and Toledo Shore Line R.R. v. *United Transportation Union*, ... U.S. ....., 24 L.Ed.2d 325, 335 (1969) 10, 15

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-8 (1916) 6

Howat v. *Kansas*, 258 U.S. 181 (1922) 14

I.A.M.A.W., et al. v. *National Railway Conference, et al.*, 73 L.R.R.M. 2319 11

In re Certain Carriers, 229 F. Supp. 259 (D.C.D.C. 1964) 11

Mercer v. *Theriot*, 377 U.S. 152 (1964) 6

National Labor Relations Board v. *Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939) 9, 10

National Labor Relations Board v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) 9

National Labor Relations Board v. *Marshall Car Wheel and Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955) 10

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U.S. 332, 344 (1939) 9

Railway & Steamship Clerks v. *Florida East Coast Ry.*, 384 U.S. 238, 246 11

Texas & N O R. Co. v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930) 10

Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) 6

United States v. *United Mine Workers*, 330 U.S. 258 (1947) 14

Walker v. *City of Birmingham*, 388 U.S. 307 (1967) 14

STATUTES

28 U.S.C. §1254(1) 2

45 U.S.C. §152 2

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

National Airlines, Incorporated (hereinafter called "National") petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court

of Appeals for the Fifth Circuit, entered in the above case on July 15, 1970, for the reason that the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Fifth Circuit, not yet reported, on which the judgment sought to be reviewed is based appears in the Appendix[1] hereto at A1. The opinion of the United States District Court for the Southern District of Florida which was reversed by the Fifth Circuit is reported at 308 F. Supp. 179 (1970) (A26). A previous opinion of the Fifth Circuit on an appeal from the denial of an interlocutory injunction is reported at 416 F.2d 998 (1969) (A10).

JURISDICTION

The opinion of the Fifth Circuit (A1) was dated and entered on July 15, 1970, and an order denying a petition for rehearing *en banc* (A9) was dated and entered on August 19, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

DOES THE RAILWAY LABOR ACT PROHIBIT A CARRIER FROM DISCHARGING ILLEGAL WILDCAT STRIKERS?

STATUTE INVOLVED

The statute principally involved is Section 2, First of the Railway Labor Act (45 U.S.C. §152):

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1. References to the Appendix herein are designated A.....

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Other pertinent sections of the Railway Labor Act (§§2, 5, 6, and 201; 45 U.S.C. 151A, 156, 181) are set forth in the Appendix (A34).

STATEMENT OF THE CASE

On Friday, January 17, 1969, National filed this action in the Miami District Court against the International Association of Machinists and Aerospace Workers (herein called the Union) and a number of its officers and members to enjoin a strike by National's mechanics at Miami and New York. The jurisdiction of the District Court in the first instance was based on jurisdiction of commerce questions under 28 U.S.C. §1337 and violation of the Railway Labor Act. At an emergency hearing on Saturday morning, January 18, 1969, a representative of the Union testified that the strike was an "unauthorized work stoppage or a sit down". The attorney for the Union stated that "we are having a difficult time getting them [the strikers] back", and conceded that a preliminary injunction enjoining the strike was appropriate. The District Court entered a preliminary injunction ordering the Union and individual defendants to restore the *status quo* by ending the work stoppage.[2]

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2. The strike had started when National had suspended three men for refusing to taxi an aircraft with a two-man crew (instead of three) in accordance with a practice commenced two and a half months earlier. The taxi dispute is not an issue on this Petition, for as noted by the Fifth Circuit, the strike was properly enjoined as illegal and constituted a failure to maintain the *status quo* in

The strikers ignored the District Court's order. On Monday, January 20, the fourth day of the strike, National scheduled a second hearing before the District Court, seeking further relief to compel compliance with the injunction. As a result of the strike, National had already been forced to cancel approximately thirty-six flights.

At the second hearing representatives of the Union asserted that the employees had disregarded the Union's orders to return to work and that the Union had lost control of its members. Thus the first injunction issued by the District Court had proved ineffective. The District Judge stated to the Union's attorney:

> "THE COURT: Well, I wonder if they are aware that the failure to report when they are required to may even amount to resignation.
>
> "MR. MANNERS [Union's attorney]: They know this. . . ."

Accordingly, the District Court entered a second order at 12:30 P.M on the same day, ordering the Union and its leaders to "advise the membership that it is the order of the Court and of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties which could include dismissal by National Airlines". Four hours after the shift change, when the strikers had failed to report, in its continuing effort to obtain the return of the strikers, National sent out telegrams notifying the strikers that they would be terminated if they did not report for duty after a twenty-four hour grace period.[3]

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violation of the Act whether or not National was right in the taxi dispute by reason of National's immediate and continuing compliance with the District Court's order to use three-man taxi crews. 416 F.2d 1003, F.N. 4. There has never been a final determination of National's right to use a two-man crew.

3. The Union stipulated that "National's object was to restore full service, and its hope was, and its efforts before [the District] Court were all designed to get these men to come back to work."

There is no dispute as to whether the strikers received notice of the orders. In addition to the telegrams of National, the Union sent out 993 telegrams advising the members of the Court's second order, and the Union announced the order over two local television channels, sent out bulletins, and spread the word by personal contact. In a subsequent hearing before the District Court the strikers (in testimony stipulated to be representative) all admitted knowledge of the injunctions.

Hence, commencing on the fifth day of the illegal strike, National, acting pursuant to its contractual right to "discipline or discharge" employees for just cause[4] discharged employees who refused to return, citing the orders of the District Court and the Union. The Union then filed a motion seeking a preliminary injunction requiring National to rescind its discharge action. At the hearing on the motion the Union offered no evidence in support of the motion, and the District Court denied it. The Union filed an interlocutory appeal and the Fifth Circuit reversed and remanded. (416 F.2d 998.) The Fifth Circuit held that "under the circumstances of this case, the resort to self-help by the carrier was not altogether prohibited by the Act" (416 F.2d at 1007), citing several factors justifying such self-help, *VIZ*:

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4. *Inter alia*, the employees had breached the collective bargaining agreement providing that:

> "The union and the employees agree that they will not cause, call, sanction or participate in any strike, work stoppage, sit-down, or slowdown, while this Agreement is in effect, until the procedures for settling disputes involving employees covered by this Agreement and as provided by the Railway Labor Act have been exhausted; provided however, that the Company will not discipline or discharge an employee or employees covered by this Agreement because of refusal to cross a lawful picket line of a union which represents a class or craft of National employees and which union and employees are in a lawful labor dispute with National Airlines, Inc."

> "The unauthorized, or wildcat, nature of the strike; the repeated refusal of the strikers to restore the *status quo* in violation of the Act; the interruption of commerce; the professed absence of control by the Union over the strikers, thus diminishing the efficacy of fines or other contempt measures directed at the Union or its representatives; and the proven inability of the carrier, the Union, and the District Court to return the strikers to work."

The Court stated that "it falls to the lot of the District Judge to pass on what changes were in fact necessary for National to continue to operate. . . Replacement of the strikers but not discharge would seem compatible with the need to restore service." 416 F.2d at 1007. The Fifth Circuit then directed the District Court to ascertain "the precise extent to which the carrier exceeded the permissible bounds of self-help, as defined herein, and determine the right of the strikers to reinstatement accordingly." 416 F.2d 1007.[5]

Upon remand the District Court received considerable testimony and other evidence and then entered an order reported at 308 F. Supp. 179. A key finding of the District Court was that "in order to hire a new work force it was necessary for National to discharge all the strikers." (308 F. Supp. at 182.)[6] The District Court went on to state (p. 183):

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5. Since the first decision of the Court of Appeals was an appeal from an interlocutory order, and the case was remanded for further action by the District Court, it was not ripe for review at that time under the rules as applied by this Court. *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1892); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). The errors in such decision may, of course, now be corrected on certiorari to the decision below. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-8 (1916); *Mercer* v. *Theriot*, 377 U.S. 152 (1964).

6. Even the Union agreed to the fact that discharge was necessary in order to hire a new work force, and the Fifth Circuit did not question this finding.

"It is now clear that in order to replace the illegally striking men National had to offer prospective employees seniority benefits and working conditions which would not be available if there was the prospect of a mixture of old and new men. National was hiring new men all over the United States. It is a fact that few of these men would have made the move to Miami without the guarantee of a solid seniority position and freedom from harassment by fellow workers.

". . . I recognize the appeal of the Fifth Circuit's statement that 'the discharge of those best suited to carry on the carrier's business * * * would seem self defeating.'

"However, it must be remembered that those 'best suited' individuals refused to work. Considering the circumstances when they were discharged, National had no way to know when they would deign to return to work absent capitulation to their demands by the company. As this court abstractly found, the strikers would have most likely returned when the suspension of the three men was lifted. Can this court, or the appellate court, then say that the only way in which National could exercise its right and duty to operate an airline and serve the public in the face of an illegal strike was to satisfy the demands of the illegal strikers? This conclusion would be a perversion of the Railway Labor Act.

"The emphasis of the Act is on an orderly, prescribed procedure. The airline (and the union) followed this procedure and twice came before this Court in attempting to maintain operations. Twice this court declared the strike illegal, with the assent of the union leadership, and twice this court issued an injunction requiring the men to return to work. These injunctions were totally ignored. . . ."

The Union again appealed. The Fifth Circuit then said in effect that it did not really mean that "it fell to the

lot of the District Judge to pass on what changes were in fact necessary" and that the District Court was "conclusively" bound by the finding made by the Fifth Circuit in its first opinion that "replacement of the strikers, but not discharge, *would seem* compatible with the need to restore service" (emphasis supplied), 416 F.2d at 1007, even though the first appeal was from a record without a scintilla of evidence on the subject. Finally the Court of Appeals held that the wildcat strikers were entitled to back pay from the time they claimed they would have come back to work had they not been discharged.

The collective bargaining agreement between National and the Union contains typical grievance-arbitration procedures. Discharge is permitted for "just cause," and as is usual the company's action is reviewable by a neutral arbitrator appointed by the National Mediation Board.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit has rejected the reasoning of this Court differentiating between the protection afforded by Federal labor laws to legal and illegal strikers.

The fundamental question raised by this Petition is whether under the Railway Labor Act employees of a carrier engaged in an illegal strike are to be treated just as if they were engaged in a legal strike or whether, as under the National Labor Relations Act, an employer may invoke sanctions against those engaged in an illegal strike not applicable to employees engaged in a legal strike.

It is well settled by the decisions of this Court that under the National Labor Relations Act an employer is free to discipline employees engaged in illegal strike activity in violation of their collective bargaining agreement in such manner as the employer sees fit and that such discipline

may include discharge. In *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939), this Court declared itself "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct," and, in the context of a sit-down strike, further stated: "When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve." (306 U.S. at 256.) Similarly, in *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U.S. 332, 344 (1939), this Court observed that "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer."

It is equally well settled that under the National Labor Relations Act an employer may only take certain limited measures to combat the effects of a legal strike and that the furthest extreme to which the employer may go in that situation is to hire permanent replacements for the employees engaged in the legal strike. *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

In the instant case the Fifth Circuit has decided that under the Railway Labor Act a carrier confronted with an illegal strike may only take the same measures of self-help that it could use if the employees were engaged in a legal strike.

We submit that the decision by the Fifth Circuit finds no support whatever in the language, much less the purpose, of the Railway Labor Act and that there is no basis whatever for treating employees engaged in an illegal strike as if they had been engaged in a legal strike. The primary

objective of the Railway Labor Act is, in the words of Mr. Justice Black in *The Detroit and Toledo Shore Line R.R.* v. *United Transportation Union*, ... U.S. ...., 24 L.Ed.2d 325, 335 (1969), ". . . the prevention of strikes . . ."[7] Yet, what the Fifth Circuit has done here is adopt a premise, unwarranted either by the language of the Railway Labor Act or any precedent, that will most surely lead to a continuing flow of the very strikes which the Railway Labor Act was primarily designed to avoid.

It has been said by this Court that "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." *Texas & N O R Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U.S. 548, 571 (1930).

The Courts of Appeal have pointed out the excessively destructive consequences of wildcat strikes in applying the principle of *Fansteel*, *supra*. *Confectionary & Tobacco Drivers* v. *National Labor Relations Board*, 312 F.2d 108 (2nd Cir. 1963); *National Labor Relations Board* v. *Marshall Car Wheel and Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955).

Although we recognize that the National Labor Relations Act cannot be applied wholesale to carriers and their employees, we think that the objective of encouraging peaceful settlement underlying the National Labor Relations Act and the disparate treatment afforded thereunder to

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7. This Court also recognized in *Shoreline* that when the peaceful processes envisioned by the Act break down resort to economic weapons is appropriate. In the same opinion, it is stated that "If the railroad is free at this stage to take advantage of the Agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively." 24 L.Ed.2d at 335. The quotation may be paraphrased as "If the [employee] is free at this stage to . . . resort to self-help, the [company] cannot be expected to hold back its own economic weapons, including [dismissal]."

illegal and legal strikers applies equally to the Railway Labor Act.

2. The decision below, by protecting and rewarding illegal wildcat strikers, severely limits the effectiveness of the Railway Labor Act in avoiding interruptions to commerce.

The wildcat strike is a pernicious and recurring problem in the transportation industry. Experience demonstrates that unfortunately railroads and airlines in this country can operate under the Railway Labor Act only by the grace of the Federal District Courts, for the Railway Labor Act is unworkable without the Federal Court injunction.[8] One dramatic recent illustration is the nationwide rail strike over the fireman issue, which, even though averted by congressionally-imposed arbitration, still required a district court injunction for implementation. See *In re Certain Carriers*, 229 F. Supp. 259 (D.C.D.C. 1964).

The rank and file appear to be unsympathetic with the congressionally-intended delays inherent in the "purposely long and drawn out" procedures of the Railway Labor Act. *Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246. They are eager to strike and if insofar as the effects on them are concerned there is no difference between a legal strike and an illegal one, why wait? Fortunately, in the great majority of cases employ-

8. In the last four years alone cases reported in BNA's Labor Relations Reference Manual (103.48) indicate injunctions against strikes against every major railroad (in the nationwide rail strike case, *I.A.M.A.W., et al.* v. *National Railway Conference, et al.*, 73 L.R.R.M. 2319) as well as other injunctions against illegal strikes by employees of Piedmont Aviation Co., American Airlines, Seaboard World Airlines, Caribbean Atlantic Airlines, The Chicago, Burlington & Quincy R.R., Long Island R.R., REA Express Co., Illinois Central R.R., Chicago, Milwaukee, Bangor & Aroostook R.R., New York, Chicago & St. Louis R.R., New York Central R.R., Chicago & N. W. R.R., Akron & Barberton Ry., Baltimore & Ohio R.R., Louisville & Nashville R.R., Southern Pacific R.R., Atlantic & West Point R.R., Union Pacific R.R.

ees obey the mandates of the federal courts, but what about those who choose not to do so?

The opinion below totally eliminates the difference between a legal strike and an illegal strike insofar as employees are concerned. The Fifth Circuit says, in both instances, that the strikers may *not* be discharged but may only be permanently replaced if replacements can be found. It was, as the District Court found, impossible under the circumstances of this case, to hire replacements for the strikers without discharging them. 308 F. Supp. 183. The right to replace intransigent wildcat strikers is neither an adequate deterrent nor a meaningful alternative to a carrier desiring to continue its operations. Under the rule adopted below a wildcat striker has the right to "hit and run", because he can return at any time (perhaps to walk out again a week or a month later) with his contractual seniority and other benefits unimpaired.

This Court has only recently enhanced the importance of no-strike clauses in collective bargaining agreements by permitting their specific enforcement in Federal Courts under Section 301 of the National Labor Relations Act. *The Boys Markets, Inc.* v. *Retail Clerk's Union*, ... U.S. ....., 26 L.Ed.2d 199 (1970).[9] It is a step backward to undermine the efficacy of a no-strike clause by prohibiting an employer from disciplining for its breach. With its urgent need to timely perform its maintenance schedules, surely an airline may discharge one employee who refuses to work for five days. If ten or a thousand employees are guilty of the same misconduct, surely the carrier does not forfeit its right to take appropriate disciplinary action pursuant to its collective bargaining agreement.

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9. The Court quoted with approval a statement by the neutral members of an A.B.A. Committee that "under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and *may discipline the employees involved.*" (Emphasis added.)

An airline must comply rigorously with federally supervised maintenance schedules tightly integrated with its airplane flights. It cannot stockpile its product. The end of a "hit and run" strike does not end the damage to the carrier, for the lag in maintenance continues to cause flight cancellations. The public has lost the services of a common carrier.

To whom does the carrier look for relief?

Even the Fifth Circuit emphasized (but understated) that the wildcat nature of the strike had the effect of "diminishing the efficacy" of relief against the Union. The Union disclaims responsibility for what it terms a wildcat strike. Its efforts to get the men to return to work are futile. Presumably it would assert Section 6 of the Norris LaGuardia Act as a defense to any claim for damages stating that unions are not responsible for unlawful acts of members except upon clear proof of actual participation or authorization of the act.

Resort to a federal district court is unavailing if as in this case the wildcat strikers are utterly unconcerned with the order of a District Judge. Here the strikers ignored the injunctions as irrelevant.

The only possible effective step in this situation is direct and meaningful disciplinary action by the carrier against the wildcat strikers themselves. Such discipline is forbidden by the opinion of the Fifth Circuit.

3. The decision of the Fifth Circuit rewards the strikers for their violation of the injunction and breach of contract by awarding them back pay from the time they now say they would have returned.

After National had discharged the illegal strikers on the fifth day of their strike, it offered them re-employment with loss of seniority, but at the same rate of pay

and with pension benefits unimpaired with the understanding that they could come back to work and grieve or contest in the courts the only penalty suffered by them: their loss of seniority. As noted by the District Court (308 F. Supp. 184 N. 3), 226 strikers voluntarily returned. The unreconstructed wildcat strikers are, says the Fifth Circuit, entitled to back pay, thus brushing aside their contumacious and wilful disobedience of two District Court injunctions, their breach of contract, and their failure to mitigate their damages by accepting the employment offered. Even the finding that the strike ended was, as both courts below recognized, an "abstract" finding, based on a hypothesis contrary to fact. 308 F. Supp. 182. The employees thus rewarded went out on a wildcat strike on Friday; they ignored an injunction on Saturday; they scoffed at a second injunction on Monday, disregarded their union's orders on Tuesday and were unswayed by National's twenty-four hour grace period before the dismissal action on Wednesday. Nor did they *ever* subsequently let National know the strike was over, or offer themselves for work, despite National's repeated solicitation of their services.

There was no claim of ignorance of either the law or the District Court's injunctions. In testimony stipulated to be representative, the strikers admitted that they knew the strike was illegal and knew of the District Court's injunctions. Those who seek to challenge injunctions must do so through the courts and not by disobeying them. E.g., *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *cf. Carroll* v. *Princess Anne*, 393 U.S. 175 (1968); *Howat* v. *Kansas*, 258 U.S. 181 (1922).

Here the employees chose to disobey the orders—and the authority of a United States District Court—by persist-

ing in their illegal strike. The Fifth Circuit, instead of punishing in any way the illegal strikers, punished National with a back pay order.

CONCLUSION

Neither the National Labor Relations Act nor the Railway Labor Act contain any express provision spelling out what remedies are available to an employer confronted with a legal strike or an illegal strike. However, under the National Labor Relations Act, as interpreted by this Court, an employer may discharge illegal strikers, though he may only replace legal strikers. The Fifth Circuit has decided that under the Railway Labor Act an employer may not discharge illegal strikers but may only replace them as if they were legal strikers. This arbitrary decision finds no support in the language or purpose of the Railway Labor Act nor in any precedent.

The decision below not only failed to implement the primary purpose of the Act but actually departed from that purpose. The primary purpose of the *status quo* provisions of the Act, as defined by this Court last December in the *Shore Line* case, *supra*, is the prevention of strikes disrupting interstate commerce. The Fifth Circuit should have implemented that purpose here by upholding the discharge of the illegal strikers. Clearly the knowledge that illegal strikers are subject to discharge is a far more effective deterrent to illegal strikes than the knowledge that illegal strikers might be replaced if the employer can find replacements. The Court not only prohibited such discharge without any support in the Act and in contravention of the purpose of the Act, but went on to reward the illegal unreplaced strikers with back pay. If ever a decision was calculated to encourage the very

strikes which the Act was designed to prevent, this decision of the Fifth Circuit fully meets that standard.

Respectfully submitted,

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APPENDIX 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29234

NATIONAL AIRLINES, Incorporated,
Plaintiff-Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(July 15, 1970)

Before GODBOLD, DYER and MORGAN,
Circuit Judges.

GODBOLD, Circuit Judge: This is the second appeal in a dispute arising from the mass discharge by National Airlines, Inc. of wildcat strikers while "freeze" provisions of the Railway Labor Act were in effect.[1] In the first appeal, taken by the union from the denial of a temporary injunction, *National Airlines, Inc. v. International Ass'n of M.&A.W.*, 416 F.2d 998 (5th Cir. 1969), this court held that National had exceeded the permissible bounds of self-help and remanded to the District Court. National's position in that appeal was that it could, without more, discharge employees engaged in a wildcat strike and thereby terminate their right to reinstatement. We pointed out that this failed to take into account the Railway Labor

1. 45 U.S.C. § 156.

Act's explicit ban on self-help during the "freeze" period, but that self-help was not absolutely prohibited.

> . . . We therefore hold that the carrier's resort to self-help was justified only to the extent necessary to restore service; its exercise was allowable only in so far as it served that end.
>
> We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. We recognize that the district court was faced with a difficult situation and had little time to deal with it. It is plain that the court's central concern was the restoration of the *status quo*. Nevertheless, we hold that the discharge of the strikers constituted an impermissible form of self-help. The discharge of the strikers was not necessary in order to hire a new labor force.

416 F.2d at 1006.

Quite plainly, this court said that self-help was allowable—to the extent necessary to restore service—but that restoration of service did not require the mass discharges. Thus, having rejected the outer limits for discharges urged by National, i.e., mass discharge of the strikers, we defined a narrow outer limit:

> . . . [R]eplacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand of the point in time when the strikers would have returned to work, e.g., the date the three suspended employees in New York returned

> to work. The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been replaced at that time, as revealed by company records, are entitled to reinstatement.

416 F.2d at 1007. In concluding, this court summarized its position in this way:

> . . . We further hold, however, that the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances. National was entitled only to hire replacements for the strikers in order to operate its airline. The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self-help, as defined here, and determine the right of the strikers to reinstatement accordingly.

416 F.2d at 1007. The permissible bounds of self-help was "as defined here," and we had defined it as not including mass discharges, but limited to employing replacements to the time the strike would have ended.

On remand the District Judge considered the permissible limits of self-help to be an issue for him to determine *vel non*. He took evidence and found that National could not have hired a new labor force to continue operating if it had not discharged the strikers en masse. Since self-help was authorized to continue operating, he concluded that no strikers were entitled to reinstatement. He held that the conclusion of this court that the mass discharge exceeded the bounds of self-help was not supported on the record as developed on remand.

The District Judge erred in his conception of the mandate of the prior appeal by which he was, of course, bound. *In re United States*, 207 F.2d 567 (5th Cir. 1953). By his construction and the resultant fact finding, he reached a

conclusion precisely contrary to the holdings of this court that self-help to continue service did not justify the mass discharge and that strikers were entitled to reinstatement unless replaced. The only matters for him to determine were when the strikers would have returned to work and who had been replaced as of that time, and to enter a direction that those not replaced be reinstated, and to adjudicate the differences, if any, over what reinstatement carried with it.

National urges that the decision of an appellate court in denying or granting a temporary injunction does not establish the law of the case, *United States v. United States Smelting R. & M. Co.*, 339 U.S. 186, 94 L.Ed. 750 (1950), especially when "evidence on a subsequent trial was substantially different" from that presented at the original trial. *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967).

But "[t]he issues before the district court at the preliminary injunction stage may be such that its order, or if the order is reviewed, the appellate court's order is conclusive of the action." 7 Moore Federal Practice ¶65.21 at 1703 (2d ed. 1968); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 96 L.Ed. 1153 (1952). Here the illegality of the mass discharge was presented on the motion for preliminary injunction and had been settled conclusively by the opinion of this court. The exception to law of the case where "evidence on a subsequent trial [is] substantially different" is inapplicable where by the prior appeal the issue is not left open for decision. *Paull v. Archer-Daniels-Midland Company*, 313 F.2d 612 (8th Cir. 1963); *Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934, 12 L.Ed. 2d 298 (1964).

We turn to the matter of relief. In the proceedings on remand the District Court held that in the absence of

the discharge the strike would have ended on January 24 when the suspension expired. 308 F. Supp. at 181-82.

The strikers are not barred from reinstatement because they, arguably, failed to make an unconditional application for reinstatement. The decision for the District Court, as framed by this court on the prior appeal, was to establish the point in time at which the suspended employees in New York, whose suspension triggered the strike, would have returned to work. That was to be the point at which it was assumed the discharged employees also would have returned to work had they been free to return rather than terminated. The matter for decision was, as the District Judge specifically recognized, an abstract one—not whether the discharged men unconditionally offered to come back to work on January 24, or conditioned their offer, or whether National unconditionally offered reinstatement, or offered less than that, but what it could reasonably be inferred would have happened if the suspensions of the New York employees had been removed as a cause of disaffection. This is not the National Labor Relations Act situation of the economic striker who unconditionally offers to return to work to protect his right to pay, or the employer who offers reinstatement which if not accepted may terminate the right to pay. We are concerned with the right of wrongfully discharged employees to a judicially directed reinstatement under the terms of this court's orders. The District Judge's finding fixing January 24 as the day on which the strike would have ended is supported by a mass of evidence.

However, we must remand the case for further findings because of uncertainties as to whether a small class of discharged employees had been replaced. The District Judge found that on January 24 National had on its premises four men who had been hired to replace strikers

and that it hired 63 more on the 24th.[2] These findings raise two questions. What does "hired" mean, and when did National's right to "hire" replacements terminate?

The District Court considered that a replacement was hired and his predecessor's position filled when National had approved and extended an offer of employment to a new man and the applicant had accepted the offer. He noted that many of those in this category were applicants from outside the State of Florida who had to return home and prepare to move in order to begin work.

The word "hire" may be used in many different senses, representing a legal conclusion as well as a summary of a state of facts, *International Ass'n of Machinists v. International Air Service*, 302 F. 2d 808 (4th Cir. 1962), and the word "replaced," in the factual circumstances of the present case, is also ambiguous. In cases of replacement of a striker the critical time is when the arrangements with the replacement worker becomes fixed and irrevocable. *International Ass'n of Machinists, supra.* Thus, if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is "hired" even though subsequently he may be divested of the job for failure to pass medical or security clearance. *Lodge 743, International Ass'n of Machinists v. United Aircraft Corp.*, 299 F. Supp. 877, 893 (D. Conn. 1969).

Also, we do not know if the District Court considered whether those persons he concluded were replacements because they had entered into employment contracts ever

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2. The union asserts that the 63 includes the four. This is a matter which can be clarified on remand.

In the lower court counsel for the union stated that he would accept the figure of 67 as the number of people "hired through the 24th." In context, the reference was to a number and not of the legal concept of who had been "hired."

actually reported for work. *International Ass'n of Machinists v. International Air Service, supra,* was remanded in order that the District Court could inquire into what enforceable obligations had been created between company and replacements and whether the replacements had ever acquired payroll status. The necessity of actually coming on the payroll is especially significant in the particular context of the present case where the undergirding rationale is preservation of the status quo as provided by the Railway Labor Act, a status the prior appeal sought to restore as of the time the strike would have ended. It would be inconsistent with that concept to hold that a discharged employee could not be restored to status quo because a contract had been made to replace him, if in fact the replacement never entered into the service of the company. In the run of the mill case of striker replacement the replacement is at work and the significance of a contract of employment is only to establish the time at which his employment commenced. In the present case, the formation of an employment contract with a replacement, which never ripens into actual employment, may not displace the statutory right of the discharged employee to return to the status quo.

The persons determined to be entitled to reinstatement must be reinstated with full benefits including back pay. *United Indus. Workers v. Board of Trustees of Galveston Wharves,* 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905, 23 L.Ed. 2d 219 (1969); Cf. *Mungin v. Florida East Coast Railway Company,* 416 F.2d 1169, 1177 (5th Cir. 1969). The *Galveston* case describes both benefits and manner of calculation.

Apparently some discharged strikers were taken back before January 24, some of them pursuant to their specific

requests, others as "new employees" without seniority. National urges that any such employee who has lost seniority, pay or other benefits, must grieve for his loss. National is in the peculiar position of urging that those who voluntarily came back to work are to be treated less well than those who did not. Resort to grievance procedures would only further fragment proceedings already difficult enough and would be inconsistent with the underpinning principle of restoration of the status quo. These employees are entitled to the same type of relief as those whose right to reinstatement is court-ordered.

Appellant claims that if a striker has been replaced and a vacancy he is qualified to fill has since arisen, he is entitled to be reinstated to that vacancy and to back pay and benefits from the time the vacancy arose. This issue was not determined on the prior appeal or by the District Court on remand and is for the District Court in the first instance.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX 2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29234

NATIONAL AIRLINES, Incorporated,
Plaintiff-Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

On Petition for Rehearing and Petition for Rehearing En Banc

(August 19, 1970)

Before GODBOLD, DYER and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27312

NATIONAL AIRLINES, INCORPORATED,
Plaintiff-Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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(September 23, 1969)

Before BELL and THORNBERRY, Circuit Judges, and CHOATE, District Judge.

THORNBERRY, Circuit Judge: This case concerns the *status quo* or "freeze" provisions of the Railway Labor Act applicable to major disputes. It arises out of a wildcat strike by the carrier's employees while the orderly processes provided by the Act were running their course. The question is whether the carrier, under the unusual circumstances of this case, violated the status quo by discharging strikers who refused to return to work under court order. The district court held that it did not, and, accordingly, that the employees were not entitled to reinstatement. We REVERSE and REMAND.

On October 31, 1968, National Airlines and the International Association of Machinists and Aerospace Workers, AFL-CIO (Union) exchanged § 6 notices of desired changes in their collective bargaining agreement. The parties thereby invoked the elaborate procedures set forth by the Railway Labor Act for the resolution of major disputes, which the Supreme Court has recently outlined as follows:

> . . . A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. *While the dispute is working its way through these states, neither party may unilaterally alter the status quo.* § 2 Seventh, 5 First, 6, 10 (Emphasis added)

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 1969, 89 S.Ct. 1109, 1115. Conferences between the parties failed to resolve the dispute over the suggested changes, and several matters were referred to the National Mediation Board in December, 1968. All events giving rise to this suit occurred after the procedures of the Act had been set in motion, but before their completion.

Against this background, National suspended three men on Friday, January 17, 1969, at Kennedy Airport for

refusing to taxi an aircraft. The action of the men in question was in response to a controversial order issued by the carrier reducing the number of men needed to taxi an aircraft from three to two. The men apparently determined that the reduction created an unsafe condition. Almost immediately after the suspension, members of the Union sat down on the job at National's Kennedy Airport and Miami International facilities.

Later that same afternoon, National filed a suit in the court below seeking injunctive relief against the Union alleging that the Union had violated the status quo requirements of the Act and had breached the collective bargaining contract by participating in a strike or sit down. At an emergency hearing the next morning, January 18, 1969, a representative of the Union testified that the strike was an "unauthorized work stoppage or a sit down." The attorney for the Union stated that "we are having a difficult time getting them [the strikers] back," and conceded that a preliminary injunction enjoining the strike was appropriate. The court entered a preliminary injunction ordering the Union to restore the *status quo* by ending the work stoppage. In addition, the Union sought and obtained a temporary restraining order requiring National to employ three men to taxi aircraft.[1]

Although National complied with the court's order on the taxi dispute, the Union's attempts to return the men to work were unsuccessful, and the strike continued. On January 20, the fourth day of the strike, the airline scheduled

1. Since the filing of this appeal, the district court has sustained the Union's position on the taxi dispute, holding that National violated the *status quo* by changing the number of men required to taxi an aircraft after the procedures of the Act were set in motion by the § 6 notices on October 31, 1968. The court changed the temporary restraining order into a preliminary injunction directing National to taxi with at least three men until the procedures of the Act are exhausted.

a second hearing before the district court, seeking further relief to compel compliance with the injunction. As a result of the strike, the airline had already cancelled approximately 36 flights. Representatives of the Union asserted that the employees disregarded the Union's orders to return to work and that the Union had lost control of its members. The first injunction issued by the court had proved ineffective. Accordingly, the district court entered a second order at 12:30 P.M. on the same day, ordering the defendants to "advise the membership that it is the order of the Court and of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties *which could include dismissal by NATIONAL AIRLINES.*" (Emphasis added). At 3:41 P.M. that afternoon, the Union sent out 993 telegrams advising its members of the court's second order. Shortly thereafter, at approximately 7:00 P.M. that evening, National notified the strikers that they would be terminated if they did not report for duty at their next regularly scheduled shifts starting at 3:30 P.M. the next day, January 21.

When the strikers did not return to work the next day at the 3:30 P.M. shift, National sent termination notices to approximately 940 IAMAW workers. The Union promptly filed a motion to dissolve the orders enjoining and restraining the strike and, in addition, an "Application for Rule to Show Cause and Preliminary Injunction," seeking to require the reinstatement of all discharged employees. The district court denied the motion and application, and the Union appeals.

The Union's position is that the discharge of the striking employees violated the *status quo* or "freeze" provisions of the Railway Labor Act, and that the discharged employees are therefore entitled to reinstatement. The ap-

plicable provision of the Railway Labor Act is Section 6, 45 U.S.C. § 156, which provides in relevant part:

> In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party . . . *rates of pay, rules, or working conditions shall not be altered by the carrier* until the controversy has been finally acted upon, as required by section 155 of this title. . . . [Emphasis added].

"The purpose of § 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted." *Manning v. American Airlines, Inc.*, 2d Cir. 1964, 329 F.2d 32, 35. "[T]he legislative history of the statute shows the 'freeze' provisions were intended to enforce a 'cooling off' period upon both labor and management. . . ." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 2d Cir. 1962, 307 F.2d 21, 45, n. 11 (dissenting opinion). Consequently, where a dispute is working its way through the processes provided by the Act, "neither party may unilaterally alter the *status quo*," *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 1969, 89 S.Ct. 1109, 1115; and "no self-help is permitted." *Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co.*, D.C. Cir. 1967, 385 F.2d 581, 597. "[T]he parties may not . . . have resort to either the strike or the lockout before the procedures provided by the Act have been exhausted and a strike or lockout during that period is illegal and forbidden by the Act." *American Airlines, Inc. v. Air Line Pilots Ass'n*, S.D. N.Y. 1958, 169 F. Supp. 777, 789.

National argues that the *status quo* provisions of the Act are inapposite here because the change in the taxi crews constitutes only a "minor" dispute.[2] National points

2. *See Elgin, Joliet and Eastern R. Co. v. Burley*, 1945, 325 U.S. 711, 722-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886; *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 8th Cir. 1963, 322 F.2d 793, 795 on the distinction between major and minor disputes.

out that the men struck over the suspension of the three employees in New York who were suspended because they disputed the work change in the taxi crews at JFK by refusing an assignment to taxi an aircraft. Inasmuch as this minor dispute ultimately led to the discharge of the strikers, the argument continues, the *status quo* provisions of the Act, applicable only to major disputes, cannot be invoked to compel reinstatement. But it is undisputed that the "major dispute" procedures of the Act were brought into play by the exchange of § 6 notices on October 31, 1968 and that those procedures had not been exhausted on January 21, 1969 when the strikers were discharged. Consequently, the discharge occurred during a "freeze" period when self-help is ordinarily unlawful. This would be true even if (and we need not decide the issue) the change in the taxi crews constituted a minor dispute: Plainly a carrier may not, under the guise of resolving a minor dispute, circumvent and defeat the statutory proscription on self-help while a major dispute is running its course. *Cf. Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry. Co.*, 1966, 384 U.S. 238, 247, 86 S.Ct. 1420, 1425, 16 L.Ed.2d 501. The statutory ban on self-help is apposite: The question is whether this change violated the *status quo*.

The Union maintains that the discharge of the striking employees constitutes a permanent change in the *status quo*, thereby truncating the purpose of the Railway Labor Act. It argues that the district court abused its discretion and departed from its limited role as guardian of the *status quo* by including a provision in the January 20 order that strikers who refused to return to work "are subject to penalties which could include dismissal by NATIONAL AIRLINES." The Union stresses the impropriety and inflammatory effect of National's January 20 notice to the strikers that they would be discharged if they

failed to return to work the next day. It emphasizes that the Union, not the carrier, was ordered to notify the strikers of the court's order. This "anticipatory discharge" or "constructive lockout" was thus a breach of National's obligation under the Act. Moreover, the Union further argues, the exercise of self-help by the strikers did not automatically create a right of self-help for the carrier. When the employees failed to return to work on January 21 under the second order of the court, the carrier was not thereby relieved of its obligation to maintain the *status quo*. Instead of resorting to self-help by terminating the strikers, National should have sought further aid from the district court. Consequently, the discharged strikers are entitled to reinstatement.

Weighing against the Union's claim, however, is the undisputed illegality of the strike. A strike called before completion of the major dispute procedures, like a change made by the carrier, is unlawful and may be enjoined pending compliance with the Act. *Missouri-Illinois R. Co. v. Order of Ry. Conductors*, 8 Cir. 1963, 322 F.2d 793, 796; *American Airlines, Inc. v. Airlines Pilots Ass'n*, S.D.N.Y. 1958, 169 F. Supp. 777, 787. It seems established that "the Union may strike only if it has complied with the Act." *United Industrial Workers of the Seafarers Int'l Union of North America v. Board of Trustees of Galveston Wharves*, 5th Cir. 1968, 400 F.2d 320, 334; *see* Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 COLUM. L. REV. 381, 388, 390.[3] The Union

3. The *status quo* provisions of the Railway Labor Act refer to the "representatives of the employees," § 6, or the "parties to the controversy," § 10, so that it is conceivable that only Union-sponsored strikes violate the Act. Such a literal analysis has not been applied, however, in construing other aspects of the Railway Labor Act, *see, e.g., Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 618, and it would hardly serve the purpose of the Act to hold that wildcat strikes, such as the strike involved here, did not come within the statutory ban on self-help. Moreover, it should be

here has consistently maintained that the strike was unlawful, and, with the exception of its objection to the language pertaining to discharge contained in the second order issued by the court, concedes the propriety of injunctive relief to end the strike.[4] National takes the position

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noted that § 2 of the Act provides that "it shall be the duty of . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . ."

In this connection, consider: "On February 17, 1961 the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs." *Flight Engineers v. Western Air Lines*, S.D. Cal., April 14, 1961, 48 LRRM 2487; *see also Wes Chapter, Flight Engineers' Int'l Ass'n v. National Mediation Board*, D.C. Cir. 1962, 314 F.2d 234, 237.

4. We take the case as we find it. The illegality of National's conduct with regard to the taxi dispute, see note 1, *supra*, was not advanced as a basis for denying an injunction against the strike. We therefore do not consider whether the equitable doctrine of "unclean hands," *see Florida East Coast Ry. Co. v. Brotherhood of Locomotive Engineers*, 5th Cir. 1966, 362 F.2d 482, 485, or the statutory enactment of that doctrine embodied in § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, *see Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of Locomotive Firemen*, 9th Cir. 1959, 268 F.2d 54, 60, *cert. denied* 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104, could have barred National's request for a strike injunction.

In this connection, consider the following:

> "This was at a time when the Carrier itself was in violation of the Railway Labor Act. The cases suggest that at that time, under the Act, the Union had the right to strike; that right continues until the Act is complied with by the Carrier, and thereafter ceases during and until exhaustion of the procedures set up by the Act . . . . If the Carrier refuses to follow the procedures of the Act . . . the Union may strike."

United Industrial Workers of the Seafarers Int'l Union of North America v. Board of Trustees of Galveston Wharves, 5th Cir. 1968, 400 F.2d 320, 332-334. Under this rationale, it is conceivable that the strike at the time of the first hearing was lawful. The Union, however, did not contest the initial strike injunction. In any event, the Carrier promptly complied with the January 18 temporary restraining order, issued contemporaneously with the strike injunction, and was thereafter in compliance with the Act. The strike, however, continued and was, therefore, even under the *Galveston Wharves* rationale, in violation of the Act and properly enjoinable from that point forward, if not before. Thus there would have been no bar to the issuance of the second injunction issued on January 20.

that an employer may, without more, lawfully discharge employees engaged in an unlawful or a wildcat strike and that the strikers therefore are not entitled to reinstatement. This position finds substantial support in decisions entered in analogous situations under the National Labor Relations Act. It is generally held that, under the NLRA, an employer may lawfully discharge employees who engage in "unprotected" conduct or conduct directly violative of the Act and that the discharged employees may not invoke the Act to compel reinstatement by the employer.[5] It is reasoned that "in the absence of the statute, there was nothing in the law which forbade the discharge of strikers. There is nothing in the statute, properly construed, which protects from discharge those who strike in defiance of its provisions." *N.L.R.B. v. Draper. Corp.*, 4th Cir. 1944, 145 F.2d 199, 205. "The conduct thus protected is lawful conduct." *N.L.R.B.* v. *Fansteel Metallurgical Corp., supra*, 306 U.S. 255, 59 S.Ct. at 476. These principles, developed under the NLRA, National argues, are apposite here and justify the termination of the strikers.

Although the NLRA has been referred to for assistance in construing the Railway Labor Act, *see e. g., Steele v. Louisville & N. R. Co.*, 1944, 323 U. S. 192, 200-01, 65 S.Ct. 226, 231, 89 L.Ed. 173, we heed the Supreme Court's admonition that the former "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of*

5. *E.g., N.L.R.B. v. Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627; *National Packing Co. v. N.L.R.B.*, 10th Cir. 1965, 352 F.2d 482, 485 (unlawful picketing); *Confectionary and Tobacco Drivers and Warehousemen's Union, Local 805 v. N.L.R.B.*, 2d Cir. 1963, 312 F.2d 108, 112 (unlawful wildcat strike); *N.L.R.B. v. Marshall Car Wheel and Foundry Co.*, 5th Cir. 1955, 218 F.2d 409, 413 (unprotected strike); *Ohio Ferro-Alloys Corp. v. N.L.R.B.*, 6th Cir. 1954, 213 F.2d 646, 651.

Railroad Trainmen v. Jacksonville Terminal Co., supra, 89 S.Ct. at 1118.[6]

Judge Wisdom succinctly stated the relevant differences:

> [T]he Railway Labor Act is more concerned with *continuance of the employer's operations and the employer-employee relationship.* This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved. (Emphasis added)

United Industrial Workers of the Seafarers Int'l Union of North America v. Board of Trustees of Galveston Wharves, 5th Cir. 1968, 400 F.2d 320, 329-330. National's position fails to take into account the Railway Labor Act's explicit ban on self-help during the "freeze" imposed while the procedures of the Act run their course, a factor not present in the scheme established by the National Labor Relations Act. Self-help by the employees, as the Union correctly argues, does not automatically justify self-help by the carrier. "[R]esort to the courts is preferable to this kind of self-help . . . the 'cooling-off' policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act." *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers,* 2d Cir. 1962, 307 F.2d 21, 45 (Marshall, J., dissenting). To allow the carrier to discharge all employees who strike in violation of the Railway Labor Act could undermine the Act's emphasis on "the continuance of the employer's operations

6. "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act . . . ." *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.,* 1957, 353 U.S. 30, 31, 77 S.Ct. 635, 636, 1 L.Ed.2d 622, n.2.

and the employer-employee relationship." *United Industrial Workers of the Seafarer's Int'l Union of North America v. Board of Trustees of Galveston Wharves, supra.* Under such a construction the carrier might be tempted to precipitate an unlawful strike in order to justify a massive discharge. *Cf. Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry. Co., supra,* 384 U.S. at 247, 86 S.Ct. at 1425. We do not believe therefore that the illegality of the strike either relieved National of its duty to maintain the *status quo* or justified the discharge of the strikers.

Nonetheless, we hold that under the circumstances of this case the resort to self-help by the carrier was not altogether prohibited by the Act. The strike, prompted by the suspensions of the three workers in New York, was spontaneous and unauthorized. Representatives of the Union stated at the first hearing that they were having difficulty returning the men to work. The first injunction, directing the Union to restore the *status quo* by ending the strike, proved ineffective. The strikers disregarded orders of their Union to return to work, and the carrier was already faced with the disruption of service at the time of the second hearing. At this point, it was apparent that the Union had lost control over the strikers. Contempt citations directed against the Union or its representatives, therefore, were less likely to end the strike.

In short, an unmanageable work stoppage had occurred and repeated attempts by the court, the carrier and the Union had failed to restore the *status quo* when the carrier resorted to self-help. Restoration of the *status quo* had been frustrated by a seemingly unmanageable strike. When viewed in this context, we cannot agree that the resort to self-help by the carrier would vitiate the *status quo* or subvert the orderly processes of the Act. A different case would be presented if there had appeared

any substantial likelihood that the strike could have been brought to a prompt end by further court proceedings. But the resort to the courts having proven ineffective, the carrier was permitted to resort to self-help in order to operate its business. It has been held in other contexts that strike conditions may alter the carrier's statutory obligations to maintain agreements and preserve the *status quo*. Thus a carrier faced with a lawful strike over issues which have been carried through the procedures of the Act to an impasse may lawfully depart from other terms of the collective bargaining agreement without following the procedures of the Act, to the extent "reasonably necessary" to continue its operations. *Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry. Co.*, 1966, 384 U.S. 238, 248, 86 S.Ct. 1420, 1425; *Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen, AFL-CIO*, 5th Cir. 1964, 336 F.2d 172, 182. The same principle is apposite here.

But the carrier's right to resort to self-help was not unlimited. Again, the principles developed in the *Florida East Coast* cases, *supra*, are applicable here. In those cases the courts defined the extent to which a carrier faced with a lawful strike is free to institute changes without complying with the procedures provided in § 6. The carrier's right to self-help, though explicitly recognized, was carefully circumscribed. The Supreme Court stated that "the justification for permitting the carrier to depart from the terms of the collective bargaining agreement *lies in its duty to continue to serve the public.*" *Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry. Co.*, *supra*, 384 U.S. at 247, 86 S.Ct. at 1425, 16 L.Ed.2d 501, n.8. (Emphasis added). Consequently, "while the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly

confined, if the spirit of the Railway Labor Act is to be honored." *Id.* 384 U.S. at 247, 86 S.Ct. at 1425. As Judge Brown stated for this Court:

> "[I]n order for the District Judge to allow FEC to escape the ban on institution of changes pending exhaustion of the statutory procedures recognized by the decisions, he must be convinced that in order to make a meaningful reality of FEC's right to continue to operate, the changes are reasonably necessary."

Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen, AFL-CIO, 5th Cir. 1964, 336 F.2d 172, 182. We recognize that the courts were there dealing with the carrier's right to make necessary changes in response to a *lawful* strike whereas the present case involves the carrier's response to an *unlawful* strike. Thus it could be argued that the carrier's right to self-help is greater here. But the Act's primary emphasis on "the continuance of the employer's operations and the employer-employee relationship," *United Industrial Workers of the Seafarer's Int'l Union of North America v. Board of Trustees of Galveston Wharves, supra,* is the same in either context and the resort to self-help by either side ought to be carefully circumscribed in both. We therefore hold that the carrier's resort to self-help was justified only to the extent necessary to restore service, its exercise was allowable only in so far as it served that end.

We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. We recognize that the district court was faced with a difficult situation and had little time to deal with it. It is plain that the court's central concern was the restoration of the *status quo*. Nevertheless, we hold that the discharge of the strikers constituted an impermissible form of self-help. The discharge of the strikers was not necessary in order to hire a new labor force. Under both the

NLRA and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. *E.g., N.L.R.B. v. Mackay Radio & Tel. Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381; *Flight Engineers Int'l Ass'n v. Eastern Air Lines, Inc.*, S.D.N.Y. 1962, 208 F. Supp. 182, 194, *aff'd* 307 F.2d 510. The hiring of replacements for the strikers would have been consistent with the attempt to restore service. The discharge of those best suited to carry on the carrier's business, on the other hand, would seem self-defeating: It prevented the possible restoration of the *status quo* should some or all of the strikers choose to return to work before enough replacements were hired. In this connection, we note that immediately after the discharge of the strikers, National notified the three men whose suspension had triggered the strike that they would be allowed to return to work on Friday, January 24, 1969, three days after the discharge of the strikers. It is possible that the strikers would have returned to work on Friday, January 24, when the three disciplined employees returned to work. The carrier's discharge of the strikers, therefore, may have foreclosed any opportunity to end the strike and restore the *status quo.*[7]

We think "it falls to the lot of the District Judge to pass on what changes were in fact necessary for [National] to continue to operate." *Florida East Coast Ry. Co. v. Brotherhood of Railway Trainmen, AFL-CIO, supra*, 336 F.2d at 182. As indicated, replacement of the strikers, but not discharge, would seem compatible with

7. Additionally, we think National acted too hastily when it determined to discharge the strikers rather than returning to the district court for further advice. The court's order indicated only that the failure to return to work "could" subject the strikers to dismissal by National, not that it would do so. The primary responsibility for ending the strike rested in the district court: It was the court's responsibility and prerogative, not the carrier's, to compel compliance with the court orders. Before resorting to self-help, National should have sought authority from the court.

the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand of the point in time when the strikers would have returned to work, e.g., the date the three suspended employees in New York returned to work. The strikers, who are in a better position to cast light on this issue should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been replaced at that time, as revealed by company records, are entitled to reinstatement.

In summary, we hold that the exercise of self-help by the carrier was not altogether barred by the Act. The holding is limited to the facts of this case. We emphasize: The unauthorized, or wildcat, nature of the strike; the repeated refusal of the strikers to restore the *status quo* in violation of the Act; the interruption of commerce; the professed absence of control by the Union over the strikers, thus diminishing the efficacy of fines or other contempt measures directed at the Union or its representatives; and the proven inability of the carrier, the Union, and the district court to return the strikers to work. We further hold, however, that the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances. National was entitled only to hire replacements for the strikers in order to operate its airline. The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self-help, as defined here, and determine the right of the strikers to reinstatement accordingly.

REVERSED AND REMANDED.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27312

D. C. Docket No. Civ-69-83-CA
NATIONAL AIRLINES, INCORPORATED,
Plaintiff-Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before BELL and THORNBERRY, Circuit Judges, and CHOATE, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: October 15, 1969.

APPENDIX 5

NATIONAL AIRLINES, INC., Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS et al., Defendants.

No. 69-83-Civ-CA.

United States District Court
S. D. Florida,
Miami Division.
Jan. 12, 1970.

* * *

Order on Mandate

ATKINS, District Judge.

This is a formal order entered in accordance with my oral ruling of December 23, 1969. That ruling was made pursuant to the opinion and mandate of the Fifth Circuit Court of Appeals entered September 23, 1969, and October 15, 1969, respectively (Docket No. 27312). The appellate decision reviewed and reversed action taken by this Court on January 24, 1969, in refusing to issue an injunction requiring National Airlines (hereinafter National) to reinstate illegally striking members of the International Association of Machinists and Aerospace Workers (hereinafter the Union) which the airline had discharged. The discharge was effected by a telegram sent by National on January 20 stating that the strikers would be terminated if they did not report back to work at their next scheduled shift beginning at 3:30 p. m. on January 21. The telegram was sent on the heels of the second injunction issued by this Court ordering the strikers to return to work. Neither the injunctions nor the telegram was effective. Further

repetition of the facts seems unnecessary. They are unfortunately familiar to the many parties in this tragic labor dispute. For the sake of clarity the factual background of this case is set forth in the appellate opinion, National Airlines, Inc. v. International Association of Machinists and Aerospace Workers, et al., 5 Cir., 416 F.2d 998 at 1000-1001 and is herein incorporated by reference.

The duty given this Court on remand is succinctly expressed in the last sentence of the appellate opinion. "The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self-help, as defined here, and determine the right of the strikers to reinstatement accordingly." 416 F.2d at 1007. This statement must be viewed in the context of the entire opinion. The primary emphasis of the Railway Labor Act is, as stated in the opinion, "[the] continuance of the employer's operations and the employer-employee relationship." United Industrial Workers of the Seafarer's Int'l. Union of North America v. Board of Trustees of Galveston Wharves, 5th Cir. 1968, 400 F.2d 320, 329, 330. With this in mind the appellate court held that "the carrier's resort to self-help was justified only to the extent necessary to restore service; its exercise was allowable only in so far as it served that end." 416 F.2d at 1006. The Court then found that it was not necessary for the airline to discharge the strikers in order to hire a new work force and that the airline had exercised an impermissible form of self-help in so doing. The court said that the airline should have replaced the strikers as it found new employees to do so. This court is charged in the opinion with determining when the strike would have ended had it not been for the illegal discharge. Once that time is established this court must then determine which strikers had been replaced at that time. Those strikers who had been replaced then would not be entitled to reinstatement.

On November 4, 1969 following issuance of the mandate, the Union filed a motion to reinstate the application for a preliminary injunction originally denied by this Court on January 24, 1969. This motion was accompanied by 937 substantially identical affidavits signed by discharged strikers stating that they would have returned to work at National on January 24, 1969.[1] * * * The union also applied for relief on the mandate. Accordingly this court scheduled a series of conferences and hearings in order to receive evidence on the factual issues outlined above: The extent to which National exceeded the bounds of self-help; the time at which the strike would have ended; and what strikers had been replaced at that time.

Through the commendable efforts of all counsel the great bulk of the evidence has been presented by stipulation. This exhibition of professionalism dramatically shortened the time required to try the factual issues.

I find as follows with regard to these issues.

The catalyst which initiated the strike was the January 17, 1969 suspension of three union members for their failure to carry out a work assignment. Although speculative, the evidence shows, and I find that, in the absence of the discharge, the strike would have ended on January 24 when the suspension expired. This conclusion presupposes that the strikers would have been willing to return with no guarantee concerning pay and other benefits lost during their 7 day absence. Dealing in the abstract I cannot find that this supposition is a fact however it does seem reasonable.

As it happened, the strikers did not return on the 24th because they had been discharged. The three men who had been suspended did not return on the 24th either, as the Fifth Circuit erroneously assumed. 416 F.2d at

1006, 1007. I do not find that this factual error affects this aspect of the case on remand. The purpose of the strike was to secure for the three men the right to return to work. This was accomplished by the expiration of the suspension. Whether the three men actually physically returned to work at that time would seem irrelevant to the conclusion of the strike.

Next to be determined is the question of which strikers had been replaced as of January 24, 1969. I find that on January 24 National had four new men on its premises who had been hired to replace strikers. I further find that on that date National had approved and extended offers of employment to 63 replacements which had been accepted by the applicants. These 63 men were not, however, working for National on the 24th. The issue thus becomes whether an offer of employment to a new man constitutes replacement of a former employee. Do the 63 offers mean that 63 "positions were filled"? 416 F.2d at 1007. I find that, in the circumstances, the offers did constitute replacement. The majority of the offers were made to men from outside the State of Florida who had to return home and prepare to move in order to begin work. The offers were consistent with the airline's efforts to maintain service. Once National made these offers it had a commitment to honor. It had accepted the applicants' offer to work in classic contract terms. Therefore, on January 24 I find that 67 strikers had been replaced by National.

There remains for determination the most significant issue, to what extent did National exceed the permissible bounds of self-help? The appellate court specifically held that the mass discharge of the illegal strikers was not permissible, "*under the circumstances.*" I find from the evidence adduced since the remand that these "*circumstances*" are not as the Fifth Circuit perceived.

In its opinion the appellate court quoted the Supreme Court as follows: "the justification for permitting the carrier to depart from the terms of the collective bargaining agreement lies in its duty to continue to serve the public." Brotherhood of Railway and Steamship Clerks, Freight Handlers, Exp. and Station Emp., A.F.L.-C.I.O. v. Florida East Coast Ry. Co., 384 U.S. 238 at 247, 86 S.Ct. 1420, at 1425, 16 L.Ed.2d 501. This principle was elaborated upon by Judge Brown in Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen, A.F.L.-C.I.O., 5th Cir. 1964, 336 F.2d 172, 182. He again emphasized that a carrier's right to abrogate the status quo during a time of contract negotiation depends on the carrier's need to institute changes in order to continue operation. In the instant case of course contract negotiations were underway; Section 6 notices had been exchanged and both sides had an obligation to preserve the status quo. National's departure from the status quo by virtue of its mass discharge was made in an attempt to continue operations. Hindsight illustrates that this attempt was successful.

[3, 4] The reason for my decision that the strikers are not entitled to reinstatement lies in my finding from the undisputed evidence developed on the record, since remand, that in order to hire a new work force it was necessary for National to discharge all of the strikers. This evidence contradicts the language used by the Fifth Circuit in their opinion when they said "the discharge of the strikers was not necessary in order to hire a new labor force." This conclusion, upon which the court's later holding that "the mass discharge * * * exceeded the permissible bounds of employer self-help" is based, is not supported by the present record. It is now clear that in order to replace the illegally striking men National had to offer prospective employees seniority benefits and working conditions which

would not be available if there was the prospect of a mixture of old and new men. National was hiring new men all over the United States. It is a fact that few of these men would have made the move to Miami without the guarantee of a solid seniority position and freedom from harassment by fellow workers.

The next question is then, was it necessary for National to hire a new work force "in order to make a meaningful reality of its right to continue to operate"? Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen, A.F.L.-C.I.O., *supra*, 336 F.2d at 182. The answer is obvious. Without men to service its airplanes the company would have been forced to shut down. With supervisory personnel carrying the load the airline had cancelled 36 flights by the 3rd day of the strike and would have been forced to shut down within a very few days. The new men enabled the company to continue operations and within a month from that time 90% of the scheduled flights were operating. I recognize the appeal of the Fifth Circuit's statement that "the discharge of those best suited to carry on the carrier's business * * * would seem self defeating." However, it must be remembered that those "best suited" individuals refused to work. Considering the circumstances when they were discharged, National had no way to know when they would deign to return to work absent capitulation to their demands by the company. As this court abstractly found, the strikers would have most likely returned when the suspension of the three men was lifted. Can this court, or the appellate court, then say that the only way in which National could exercise its right and duty to operate an airline and serve the public in the face of an illegal strike was to satisfy the demands of the illegal strikers? This conclusion would be a perversion of the Railway Labor Act.

The emphasis of the Act is on an orderly, prescribed procedure. The airline (and the union)[2] followed this procedure and twice came before this Court in attempting to maintain operations. Twice this court declared the strike illegal, with the assent of the union leadership, and twice this court issued an injunction requiring the men to return to work. These injunctions were totally ignored. The seriousness with which the strikers took their responsibilities under the law is illustrated by the testimony of Messrs. Exum, Ober, Ballas and Brown before this court on December 3, 1969. There was no further procedure prescribed by the Railway Labor Act which the airline could have invoked. Here I find relevant the following portions of the oft quoted Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainman, A.F.L.-C.I.O., *supra* at 181:

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. * * *
>
> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I.R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.
>
> "* * * But when the machinery of industrial peace fails, the policy in all national labor legislation is to

2. It will be remembered that this court found National violated the status quo by changing the airplane taxi crew complement and that appropriate injunctive relief was afforded the Union at their request. This injunction is honored to this day.

> let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate."

The Fifth Circuit noted the relevance of this FEC case in its opinion in this case and the analogy between the two is clear.

In conclusion, this Court has often been reminded that it sits as a court of equity while passing on the many requests for injunctions in this case. There are hundreds of wives and children of strikers caught up in this dispute to whom the word equity is non-existent. These persons are the victims of circumstances beyond their control. But the strikers were not such victims although some were permitted to believe that the three men had been fired rather than suspended. They chose their course—disregard for court orders, disregard for their job except under their conditions.[3]

The balancing of the equities is between these men and the airline. True, the mass discharge was swift but the strike took place in the heart of the company's busiest time—the tourist season. The little noted words of a distinquished brother judge, the late Alexander Holtzoff, are compelling here. In issuing an injunction restraining an unlawful strike in a Railway Labor Act case he said:

> Any employee who without lawful excuse fails to appear for work runs the risk of having such failure properly treated by his employer, either as a tender of resignation or as a ground for discharge. In re Certain Carriers, Etc., 229 F.Supp. 259 at 261 (D.C D.C., 1964).

If this principle is to be disregarded why are there laws defining the legality of strikes? If workers can strike at

3. It must be noted that 226 strikers have voluntarily returned to their jobs at National as of this date.

will no framework is needed. I hold that the principle is not to be disregarded and reiterate in accordance with the framework of the Railway Labor Act, that, faced with an illegal strike, National's departure from the terms of its collective bargaining agreement with the Union, to wit, the mass discharge was justified as it was reasonably necessary to allow the airline to assemble a new work force and thereby continue operation. Accordingly the Union's motion for an injunction requiring National to reinstate those strikers who have not returned to their jobs is denied.

• • •

APPENDIX 6

45 U.S.C.

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

§ 152. General duties—Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or

agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

• • •

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for

or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1187.

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§ 181. Application of sections 151, 152, and 154-163 to carriers by air

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. May 20, 1926, c. 347, § 201, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTE INVOLVED	2
ARGUMENT	8
CONCLUSION	14

AUTHORITIES CITED

CASES:

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369	11
Corning Glass Works v. N.L.R.B., 129 F.2d 967 (C.A.2)	12
Detroit and Toledo Shore Line Railroad Co. v. United Transportation Union, 396 U.S. 142	8
Electro-Mechanical Products Co., 126 NLRB 637	12
National Airlines v. International Association of Machinists and Aerospace Workers, 303 F. Supp. 1132 (S.D. Fla.)	3
NAL v. IAM, No. 29234	14
N.L.R.B. v. Armour Co., 154 F.2d 570 (C.A. 10)	12
N.L.R.B. v. American National Insurance Co., 343 U.S. 395	10
N.L.R.B. v. Mooney Aircraft, 366 F.2d 809 (C.A.5)	12
N.L.R.B. v. Pittsburgh S. S. Co., 340 U.S. 498	10, 13
N.L.R.B. v. Poultrymen's Service Corp., 138 F.2d 204 (C.A.3)	12
N.L.R.B. v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258	10, 12
Universal Camera Corp. v. N.L.R.B., 340 US. 474	11

STATUTES AND RULES:

Section 6, Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. § 151, *et. seq.*)	2
U.S. Sup. Ct. Rules 19(1)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 782

NATIONAL AIRLINES, INC., *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

The Railway Labor Act requires maintenance of the status quo during the pendency of the procedures prescribed by the Act for the resolution of a dispute over requested changes in contract terms. The question presented is whether, in the particular circumstances of

this case appraised in the light of the status quo requirement, the carrier's recourse during the status quo period to self-help to restore service interrupted by an unauthorized work stoppage did not properly extend to the mass discharge of all the strikers (comprising nearly all the work force) but was appropriately limited to replacement of the strikers.

STATUTE INVOLVED

Section 6 of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. § 151, *et. seq.*) provides that:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

STATEMENT

National Airlines, an air carrier operating at John F. Kennedy Airport at New York and Miami International Airport, employs a class of workers known as mechanical, stores and related employees, represented in collective bargaining by the International Association of Machinists and Aerospace Workers (the Union). On October 31, 1968, National and the Union exchanged notices of the changes each desired in their

collective bargaining agreement in accordance with Section 6 of the Railway Labor Act (A. 11).[1] The consequence of the exchange of Section 6 notices was to invoke the statutory requirement of the Railway Labor Act to maintain the status quo pending exhaustion of the procedures prescribed by the Act for the resolution of a dispute over requested changes in contract terms (A. 11).

During the status quo period National reduced the number of men to taxi an aircraft from three to two, a change later found to violate its obligation to maintain the status quo (A. 12, and n.1, A. 32, n.2).[2] On January 17, 1969, based on apprehension concerning safety, three men refused to taxi an aircraft with the reduced complement, and National thereupon suspended them (A. 11-12). Almost immediately after the suspension of the three men, in protest against it, their fellow employees at John F. Kennedy Airport and Miami International Airport refused to work (A. 12). The strike was not authorized by the Union (A. 12).

On January 18, 1969, on National's application and with the Union's acquiescence, the District Court enjoined the work stoppage, and, at the Union's instance, ordered the use of three men to taxi aircraft (A. 12).

National resumed taxiing aircraft with three men but did not then lift the suspension of the three employees (A. 12, 23). In these circumstances the Union's attempts to return the strikers to work were unsuccess-

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[1] The symbol "A" followed by the numeral refers to the page of the decisions of the Court of Appeals and the District Court as reproduced in the petition. The symbol "R" refers to the appendix in the Court of Appeals.

[2] See also, *National Airlines* v. *International Association of Machinists and Aerospace Workers*, 303 F. Supp. 1132, 1134 (S. D. Fla.).

ful and the stoppage continued (A. 12). On January 20, 1969, upon National's request for further relief, the District Court entered an order requiring that the Union "advise the membership that it is the order of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties *which could include dismissal by National Airlines*" (A. 12-13, emphasis added by Court of Appeals). At 3:41 p.m. that afternoon, the Union sent out 993 telegrams advising its members of the District Court's second order (A. 13). About 7:00 p.m. that evening, without prior authority of the Court, National notified the strikers that they would be terminated if they did not report for duty at their next regularly scheduled shifts starting at 3:30 p.m. the next day, January 21 (A. 13, 23, n.1).

When the strikers did not return to work the next day at the 3:30 p.m. shift, National forthwith sent termination notices to approximately 940 workers (A. 13). Immediately *after* making this mass discharge, National notified the three men whose suspension had triggered the strike that they would be allowed to return to work on Friday, January 24, three days after the discharge of the strikers (A. 23). The Union promptly sought an injunction of the District Court seeking to require the reinstatement of all discharged employees (A. 13). On January 24 the parties were before the District Court to be heard on the Union's request to vacate the mass discharge (R. 221-287, 444-448, first appeal). The Union's counsel pleaded that, "I could guarantee to Your Honor today that 940 people, if that telegram or wire [discharging them] was rescinded by the Court's order, I could guarantee that 940 people that were discharged and every employee on the airline would be back to work tomorrow" (*id.*

279-280). But National opposed any relief, arguing that it had the right to discharge the strikers, and it did not choose to relent (*id.* 259-276, 285-287). The District Court denied any relief against the mass discharge (A. 13).

The Court of Appeals reversed on appeal. It held that "the mass discharge of the strikers exceeded the permissible bounds of self-help under the circumstances" (A. 24). It reached this conclusion by striking a statutory balance between the obligation to maintain the status quo and the need to restore service in coping with an unauthorized stoppage in the particular circumstances of its occurrence. In striking a balance it adopted as the premise of decision that the "carrier's resort to self-help was justified only to the extent necessary to restore service; its exercise was allowable only insofar as it served that end" (A. 22). It explained that the mass discharge exceeded the justifiable limits for the following reasons (A. 22-23):

> We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. . . . The discharge of the strikers was not necessary in order to hire a new labor force. Under both the NLRA and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. . . . The hiring of replacements for the strikers would have been consistent with the attempt to restore service. The discharge of those best suited to carry on the carrier's business, on the other hand, would seem self-defeating: It prevented the possible restoration of the *status quo* should some or all of the strikers choose to return to work before enough replacements were hired. In this connection, we note that immediately after the discharge of the strikers, National notified the three men whose suspension had triggered the strike that they would be allowed to return to work on Friday, January 24, 1969,

> three days after the discharge of the strikers. It is possible that the strikers would have returned to work on Friday, January 24, when the three disciplined employees returned to work. The carrier's discharge of the strikers, therefore, may have foreclosed any opportunity to end the strike and restore the *status quo*.

The Court of Appeals further observed that by the mass discharge National had acted precipitately and without prior leave of the District Court (A. 23, n.7):

> Additionally, we think National acted too hastily when it determined to discharge the strikers rather than returning to the district court for further advice. The court's order indicated only that the failure to return to work "could" subject the strikers to dismissal by National, not that it would do so. The primary responsibility for ending the strike rested in the district court: It was the court's responsibility and prerogative, not the carrier's, to compel compliance with the court orders. Before resorting to self-help, National should have sought authority from the court.

Having determined that replacement, but not discharge, was appropriate as self-help, the Court of Appeals ordered a remand and defined the issues open on remand as follows (A. 23-24):

> As indicated, replacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand of the point in time when the strikers

> would have returned to work, *e.g.*, the date the three suspended employees in New York returned to work. The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been replaced at that time, as revealed by company records, are entitled to reinstatement.

Accordingly, the sole matters open on the remand were (1) determination of the time when the strikers would have returned to work, (2) ascertainment of the number of strikers who had been replaced as of that time, and (3) direction that National reinstate the unreplaced strikers. (A. 23-24, 1-4).

On remand, the District Court found that, (1) but for the mass discharge, the stoppage would have ended on January 24, 1969, with the lifting of the suspension of the three men who had refused to taxi aircraft with a reduced crew (A. 28-29), and that, (2) on January 24, 67 strikers had been replaced by National (A. 29). But the District Court nevertheless refused to direct the reinstatement of the unreplaced strikers because in its view the mass discharge was essential to restoration of service (A. 29-34).

On a second appeal the Court of Appeals again reversed. It held that (1) limitation of self-help to replacement had been settled on the previous appeal and and redetermination of that issue was beyond the authority of the District Court (A. 1-4), (2) the District Court had applied erroneous standards in determining that 67 strikers had been replaced and it should reconsider in accordance with the correct standards whether that or a lesser number of strikers had been replaced (A. 6-7), and (3) those strikers determined to be unreplaced "must be reinstated with full benefits including back pay" (A. 7).

ARGUMENT

The decision below is a reasonable accommodation of competing considerations in applying the status quo requirement of the Railway Labor Act to particular circumstances, involves no conflict of decision, and pertains to an atypical and nonrecurrent situation. Grant of certiorari would therefore not be warranted.

1. The premise of the Court of Appeals in illegalizing the mass discharge is that, in the operation of the scheme of the Railway Labor Act, it is indispensable to maintain the status quo during the period that agreement is sought through utilization of the statutory machinery. This Court has recently emphatically reaffirmed this statutory imperative. *Detroit and Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142. The Act "imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted". *Id.* at 149. As the Court stressed, "The Act's status quo requirement is central to its design." *Id.* at 150.

Relating the statutory mandate to the factual situation, the Court of Appeals reasonably concluded that the mass discharge, at its inception and through its continuance, utterly defeated the Act's central design. Of the approximately 1,300 employees within the class represented by the Union (R. 12, first appeal), National terminated at least 1,098 (R. 1465-66, 5-82, 87, 1081-83, 1099-1101, 1117, 1120, 1574-78, 1485-86, 1488-89, 1496-97, 1240, 1356), almost 85 percent of the work force. Discharge of 85 percent of the work force is repugnant to any concept of maintaining the status quo. Of the discharged employees, 126 returned as

new employees (R. 1574-78, 1284-86, 1488-89, 1496-97, 1240, 1356), having accepted National's offer to rehire discharged but unreplaced strikers as new employees without seniority (R. 1297, 1299). To return as a new employee without seniority is to lose all the equity that the employee had accumulated before his discharge. Thus, as a new employee one striker would lose thirteen years of seniority (R. 1372-73), another twelve years (R. 1388-89), a third seventeen years (R. 1399), and a fourth sixteen years (R. 1414). Loss of these years of service "invested in National" (R. 1373), with consequent drastic impairment in job security, turns the status quo upside-down. The upshot of the mass discharge was thus that almost 75 percent of the work force was stripped of jobs and almost ten percent of seniority.

This decimation of the work force is the antithesis of the maintenance of the status quo. Instead of negotiating new contract terms in an atmosphere free of contested alteration of existing conditions, the Union was plunged into a fight for the economic survival of its members. And that fight was itself precipitated by National's illegal alteration of the status quo by reducing from three to two men the complement used to taxi aircraft (*supra,* p. 3). Furthermore, despite the eventual availability of judicial relief requiring the employees' ultimate reinstatement with full seniority, the reality of National's interim persistence in the mass discharge was that its continuing denial of jobs to the employees served as a partial lockout. The result was that, while the Union was unable to call a full-fledged strike, National enjoyed the benefit of the economic pressure of a partial lockout. Thus, during a period when negotiations should have been free of economic weaponry, National had in hard fact brought

it arms into play, and the Union was disabled from responding. Finally, while the employees will ultimately be made whole for their loss of earnings and benefits resulting from their discharge, retroactive compensation never adequately restores the status quo. "In view of 'the economic hardship caused by . . . undeservedly substandard earnings' [in the interim prior to reinstatement], lengthy delays 'must render the back pay award a wholly inadequate and unsatisfactory remedy' to the employees for the company's refusal to reinstate them." *N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264.

This obliteration of the status quo was not essential to restoration of service. The Court of Appeals reasonably concluded that the "discharge of the strikers was not necessary in order to hire a new labor force" (A. 22), that the "hiring of replacements for the strikers," rather than their discharge, provided ample means to "restore service" (A. 23-24), and that the mass discharge, instead of furthering that object, positively interferred with the "opportunity to end the strike and restore the status quo" (A. 23). In striking this balance between the status quo and self-help in coping with the specific circumstances of a particular unauthorized strike, the Court of Appeals arrived at an informed and sensitive reconciliation of competing considerations in the application of the Railway Labor Act. Where, "as here, a statutory standard . . . can have meaning only in its application to the particular facts of a particular case" (*N. L. R. B.* v. *American National Insurance Co.*, 343 U.S. 395, 410), this Court "should 'adhere to the usual rule of non-interference' " with conclusions of the Courts of Appeals. *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 503. This is the kind of question which is "in the keeping of the Courts

of Appeals." *Universal Camera Corp.* v. *N. L. R. B.*, 340 U.S. 474, 491. In this case six different appellate judges on two appeals have unanimously concluded that National violated the Railway Labor Act. That is review enough.

2. There is no merit to National's claim that the decision below is incompatible with the rule evolved under the National Labor Relations Act authorizing the discharge or discipline of wildcat strikers (Pet. 8-11). The Court of Appeals pointed out that the analogy was false because it "fails to take into account the Railway Labor Act's explicit ban on self-help during the 'freeze' imposed while the procedures of the Act run their course, a factor not present in the scheme established by the National Labor Relations Act" (A. 19). Giving effect to this crucial difference, the Court of Appeals concluded that, in order to preserve the Railway Labor Act's emphasis upon "'cooling off' policies" and forbearance from self-help, of itself "the illegality of the strike [n]either relieved National of its duty to maintain the status quo [n]or justified the discharge of the strikers" (A. 19-20). The Court of Appeals thus heeded, as it noted (A. 18), this Court's admonition that the "National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383.

3. National overstates the question that can be presented when it asks whether "the Railway Labor Act prohibit[s] a carrier from discharging illegal wildcat strikers" (Pet. 2). The only issue is the restriction

that the Railway Labor Act imposes on recourse to self-help during the period that the status quo must be maintained. The legitimacy of resort to self-help at any other time is not involved. And even during the status quo period, the scope of the restriction is not absolute, but relates to the permissibility of self-help in the light of particular circumstances.

4. Although not part of the question it seeks to present and not fairly comprehended by it (Pet. 2), National objects to the requirement that it make the unreplaced strikers whole for the loss of earnings and benefits they suffered commencing with the time that the stoppage would have ended but for the mass discharge and ending with reinstatement (Pet. 13-15). "The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute. . . ." *N. L. R. B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263. National nevertheless protests that the employees should have returned to work as new employees and contested their loss of seniority by recourse to judicial and contractual remedies; their failure to do so, National argues, should toll back pay because the employees did not "mitigate their damages . . ." (Pet. 13-14). But it is settled law that in order to terminate its back pay liability an employer must offer the employee full and unconditional reinstatement; an employee is not required to submit to less than his due in order not to lose backpay.[3] Mitigation aside, National catalogues other sins it attrib-

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[3] *Electro-Mechanical Products Co.*, 126 NLRB 637, 648-650; *N.L.R.B.* v. *Mooney Aircraft*, 366 F.2d 809, 812 (C.A. 5); *Corning Glass Works* v. *N.L.R.B.*, 129 F.2d 967, 969 (C.A. 2); *N.L.R.B.* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210 (C.A. 3); *N.L.R.B.* v. *Armour Co.*, 154 F.2d 570, 577 (C.A. 10).

utes to the employees in order to justify denial of back pay (Pet. 13-15). Its broadside is wide of the mark. For National persistently overlooks the fact that for the period for which back pay is due—from the terminal date of the stoppage until full reinstatement is granted—it is National's own wrong in insisting upon the mass discharge which alone caused the loss, and National is simply being required to make good the harm it inflicted by its illegal action. At any rate, whether backpay ordinarily due should be denied because of claimed special circumstances presents no question warranting review. No more is involved than "a fair assessment of a record", and in such situations the Court "should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' " *N.L.R.B.* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503.

5. The Court of Appeals stressed "the unusual circumstances of this case" (A. 10), and emphasized that its "holding is limited to the facts of this case" (A. 24). A spontaneous work stoppage by employees over an issue unrelated to the negotiations, unauthorized by the Union and uncontrollable by it, is highly atypical. An employer's institution and persistence in a mass discharge is also an altogether atypical reaction. The situation is singular and nonrecurrent, and therefore does not merit this Court's review.

6. One final consideration should be mentioned. On April 23, 1970, National and the Union executed an agreement requiring reinstatement of the mass-discharged employees with full seniority, establishing January 31, 1970 as the cut-off date for computation of backpay and other benefits should the employees' make-

whole claims be sustained, and providing that "[s]uch claims shall be determined by the pending appeal in NAL vs. IAM No. 29234 and in any proceedings ensuing from it." The discharged employees have since been reinstated with full seniority in accordance with the agreement, and the Court of Appeals has since determined that the employees "entitled to reinstatement must be reinstated with full benefits including backpay" (A. 7). Agreement and adjudication have thus put a major part of the controversy to rest, further deemphasizing the existence of any "special and important reasons" for review. U.S. Sup. Ct. Rules 19(1).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1970

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Petitioner

vs.

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Respondents.

REPLY BRIEF OF PETITIONER

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Respondents.

REPLY BRIEF OF PETITIONER

We think a response is necessary to Respondents' "one final consideration" which suggests that an agreement between the parties makes the case unworthy of consideration by the Court. The contention is at best unsound and possibly misleading for the following reasons:

1. The essential error below is the pronouncement that National (and other carriers) may not discipline

illegal wildcat strikers during the "purposely long and drawn out" period during which the status quo is imposed. The complex reinstatement agreement in no way disposes of the basic question of principle applicable to the recurring wildcat strike issue.

2. The argument (Br. 14) that a major part of the controversy has been put to rest by "adjudication" is surely made facetiously. The adjudication referred to is the decision for which certiorari is sought!

3. The agreement to which the Respondents refer was presented to the Fifth Circuit upon signing, before the oral argument and was discussed at oral argument. Counsel for the Respondents urged several reasons why "these tentative agreements do not affect the questions which are before the Court," *viz*: (a) the many millions of back pay dollars and other benefits sought by the Respondents would be denied if it were determined that the Act did not forbid discharge, and (b) the filing of a law suit by the new hires attacking the back-to-work agreement, litigating their place on the seniority list *vis a vis* the discharged strikers. The Fifth Circuit did not consider that the agreement affected or limited the issues presented, and accordingly issued the decision for which review is sought.

The Union states, (Br. 13) "The situation is singular and nonrecurrent, and therefore does not merit this Court's review." How can the Union so confidently make this assertion when their basis for it is the statement that the strike was ". . . unauthorized by the Union and uncontrollable by it . . ." The fact is, "uncontrollable" situations may recur, by definition, and though neither

unions nor employers want wildcat strikes they happen with ever increasing frequency.

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